

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Kenneth J. McNeil,

Complainant,

vs.

San Antonio Water Company,

Defendant.

Case 05-09-017
(Filed September 7, 2005)

**SCOPING MEMO AND RULING OF
ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE**

A. Summary

Pursuant to Rules 6(b)(3) and 6.3 of the Commission's Rules of Practice and Procedure (Rules), this ruling sets forth the procedural schedule, assigns a presiding officer, and addresses the scope of the proceeding following a prehearing conference (PHC) held in Upland, California on December 12, 2005.

B. The Allegations in the Complaint and the Answer

The defendant in this case, San Antonio Water Company (SAWCO), is a mutual water company. Under Pub. Util. Code § 2705, a mutual water company may provide water at cost to its stockholders or members, or to certain specified government entities and other mutual water companies, without subjecting itself to the jurisdiction of this Commission. In addition, § 2705 permits a mutual water company to engage in certain specific acts — such as delivering water to lessees of its shares, or exchanging water or water rights with another entity

pursuant to state or federal law – without subjecting itself to this Commission’s jurisdiction.¹

¹ Pub. Util. Code § 2705 provides in full:

“Any corporation or association that is organized for the purposes of delivering water to its stockholders and members at cost, including use of works for conserving, treating, and reclaiming water, and that delivers water to no one except its stockholders or members, or to the state or any agency or department thereof, to any city, county, school district, or other public district, or any federal agency that provides fire protection or operates park facilities, or to any other mutual water company, at cost, is not a public utility, and is not subject to the jurisdiction, control or regulation of the commission. However, a mutual water company may perform the following acts without becoming a public utility and becoming subject to the jurisdiction, control or regulation of the commission:

(a) May deliver water at cost to any lessee of its stock or shares or other evidence of membership where the lease is in writing signed by the owner of the stock or shares or other evidence of membership and the lessee thereof and approved by the mutual water company.

(b) May deliver water at cost to any land leased by a stockholder, shareholder, or member of the mutual water company to a person not a stockholder, shareholder or member thereof, provided the lease is in writing signed by the stockholder, shareholder or member and the lessee of the land and approved by the mutual water company.

(c) May transfer water or water rights to, or exchange water or water rights with, another entity pursuant to state or federal law, or both.

(d) In a bona fide water emergency, but for no longer than the existence of the emergency, may deliver water at cost to any person owning or leasing real property located within or adjacent to the service area of the mutual water company, provided that the water

Footnote continued on next page

In this case, the complainant—a former director of SAWCO—alleges that defendant has engaged in conduct not enumerated in § 2705, and that the effect of such conduct has been to dedicate SAWCO’s operations to public service, thereby subjecting SAWCO to the Commission’s jurisdiction pursuant to Pub. Util. Code § 2702.² Specifically, the complaint alleges that the following four situations have resulted in a dedication of SAWCO’s water and facilities to public service:

is delivered pursuant to a written contract signed by the mutual water company and the person to whom the water is delivered.

(e) May deliver water pursuant to any contract for water service made:

(1) In settlement of litigation involving disputed water rights or any judgment in the litigation.

(2) In consideration of the conveyance of a well, water right, or easement for water distribution purposes.

All of these leases and contracts shall be preserved for a period of 10 years by a mutual water company and shall be subject to inspection by the commission.

The term ‘cost’ as used in this section shall be construed to mean without profit.”

² Pub. Util. Code § 2702 provides in full:

“Any corporation or association which is organized for the purpose of delivering water solely to its stockholders or members at cost, and which delivers water to others than its stockholders or members, or to the state or any department or agency thereof or any school district, or to any other mutual water company, for compensation, is a public utility and is subject to Part 1 (commencing with Section 201) and to the jurisdiction, control, and regulation of the commission.”

1. In early 2004, SAWCO allowed a non-shareholder, Yeager-Skanska Construction Company (Yeager-Skanska), to pump a substantial quantity of water from a water percolation basin (to which SAWCO has the rights) for the purpose of grading a large retail and residential development in the City of Upland (Upland). Complainant alleges that this transaction does not come within § 2705 because Yeager-Skanska is not a SAWCO shareholder, nor has it entered into any written agreement to lease SAWCO shares.
2. Complainant alleges that since October 1995, SAWCO has sold more than \$5 million of “stored” water at market-based prices, rather than at cost, to certain large SAWCO customers who own only a single share of SAWCO stock. These large customers include the City of Ontario and the Jurupa Community Services District (Jurupa). By contrast, complainant alleges, SAWCO customers like himself who live in San Antonio Heights, an unincorporated county area adjacent to the City of Upland, are “required to obtain enough stock to cover their water usage.”
3. Complainant alleges that since at least 2001, SAWCO has charged a “supplemental” rate for water in addition to its “base” rate, and that contrary to § 2705, this supplemental rate is not based on cost. Complainant also alleges that SAWCO’s current water rates “are not based upon an adopted water rate study.”
4. Complainant alleges that SAWCO has wrongfully permitted residents of the San Antonio Canyon to withdraw for their own use, water that belongs to SAWCO. Complainant alleges that “this amounts to non-shareholders using water and not paying any fee for this water” to SAWCO.

SAWCO filed its answer to the complaint on October 26, 2005. In the answer, SAWCO denies it has dedicated its facilities or water to public use, because SAWCO “does not hold itself out as willing to serve the public and historically has not done so. SAWCO serves its shareholders, not the public.” The answer does admit, however, that Upland owns approximately 68% of

SAWCO's issued and outstanding shares, and that by virtue of such ownership, Upland elects all seven members of SAWCO's board of directors.

The answer also avers that Upland has never received water from SAWCO "to the full extent of its entitlement," and that from time to time, Upland has sold water to SAWCO "at market rates for redelivery to SAWCO's shareholders."

With reference to the four specific instances cited in the complaint as evidence of a dedication, SAWCO has answered as follows:

1. SAWCO admits that it was advised by Upland to charge the water taken by Yeager-Skanska against Upland's entitlement. However, SAWCO denies that the water taken by this contractor belonged to SAWCO, but rather avers that the water was included in a percolation basin, the rights to which "belong[] to all of the rights holders in the Cucamonga Basin." SAWCO also avers that while it has the right to import a certain amount of water into this percolation basin pursuant to an easement, its rights "with respect to the percolation do not extend to doing anything other than maintaining" the basin along with the Cucamonga Valley Water District. Thus, SAWCO concludes, Yeager-Skanska's removal of the basin water is not evidence of a dedication, and SAWCO denies that a lease of its shares was required under these circumstances.
2. SAWCO admits that it has sold water stored in the Chino Basin to its shareholders, including – on one occasion – Jurupa. However, SAWCO continues, it does not have production facilities in the Chino Basin sufficient to produce and convey the groundwater to which it is entitled by judicial decree. Because of this, it enters into annual storage agreements with the Chino Basin Watermaster. The sale to Jurupa occurred after the Watermaster decided to assess losses against stored water, which made the SAWCO water stored in the Chino Basin a "wasting asset." SAWCO asserts that sales of stored water can be replaced by buying "replenishment" water from the Watermaster, which water is priced "at just slightly more than the sale price for the water sold by SAWCO." SAWCO avers that the sale of stored

water on a single occasion to Jurupa, a government agency, does not establish a public dedication, and asserts that the sale of stored water to shareholders who have the ability to take it (as Jurupa did) is permissible. SAWCO asserts that the at-cost concept in Pub. Util. Code § 2705 “is not applied ‘at source,’ but is a general concept that applies to the overall operations of a mutual water company.” Finally, SAWCO avers that the sale of stored water to shareholders like Jurupa “at water rates different from water rates for other classes of service does not establish [a] public dedication.”

3. With respect to complainant’s allegation that SAWCO’s “supplemental” water rate violates § 2705 because this rate is not based on cost, SAWCO avers that it first implemented the supplemental rate in 2003 as a water conservation measure. Even though no rate study was conducted prior to implementing the 2003 rates, SAWCO did engage a firm to conduct such a water rate study in connection with the rates it adopted in 2005, which were adopted only after a public meeting and careful consideration by the SAWCO board of the study’s recommendations, not all of which were accepted. SAWCO reiterates that the reference to “at cost” in § 2705 “means ‘overall cost’ and not necessarily [cost] in any single year of operation,” and it asserts that complainant’s allegations with respect to differential water rates are not relevant to the issue of whether there has been a dedication.
4. With respect to complainant’s allegations that SAWCO is unlawfully allowing non-shareholders in the San Antonio Canyon to use SAWCO water, defendant avers that while it has water rights in the Canyon pursuant to a judicial decree, landowners in the Canyon “possess overlying rights under law, and have the legal ability and right to produce water from wells that draw upon the water underlying their property.” Moreover, there may be diversion rights that “would permit one or more persons to divert water from San Antonio Creek.” SAWCO asserts that complainant’s allegations wrongly “assume that no one has either diversion rights or groundwater rights in San Antonio Canyon other than SAWCO,” and that “a detailed analysis of water rights would be required to determine the

rights of all water users in San Antonio Canyon, which would be time consuming and difficult to do.” In any event, SAWCO continues, whatever the situation is with respect to water usage and taking in the Canyon, these circumstances do not establish either that SAWCO is providing water to non-shareholders, or that it has dedicated its water or facilities to public use.

C. The Discussion at the PHC

As noted above, a PHC was held in Upland on December 12, 2005. The assigned Administrative Law Judge (ALJ) began the PHC by granting Upland’s petition to intervene in the proceeding, inasmuch as all parties acknowledge that Upland owns nearly 70% of SAWCO’s shares. (PHC Transcript, p. 2.)

The ALJ then described for the parties the alternative dispute resolution and mediation services that the Commission provides pursuant to Resolution ALJ-185, and he encouraged the parties to consider utilizing those services in this case. (*Id.* at 7-9.) In pointing out the virtues of mediation, the ALJ also emphasized the time constraints imposed on adjudication cases by Pub. Util. Code § 1701.2(d). He noted that if this case went to hearing, the hearing would have to be held in the first part of April 2006, which would not allow time for extensive motion practice. (*Id.* at 9-10.)

The ALJ then asked the parties for clarification as to some of the allegations in their pleadings, and about the status of discovery requests. In connection with the latter item, complainant stated that he wanted to obtain a list with the names and addresses of all SAWCO shareholders. Complainant contends he needs such a list to determine whether SAWCO has sold stored water to non-shareholders, and whether Yeager-Skanska is a shareholder. SAWCO’s counsel stated that the company has traditionally resisted requests to

produce a shareholder list.³ The ALJ pointed out that in other kinds of litigation, such lists are often produced subject to a protective order, and he emphasized that if the parties could not resolve their differences on this issue, they might be required to brief the question of complainant's access to a shareholder list on an expedited basis. (*Id.* at 18-19.)

The ALJ then turned to procedural issues connected with the hearing. He noted that because of the wide-ranging and technical nature of the allegations in the complaint, all parties would be required to set forth their factual contentions in written testimony, which would be due sufficiently in advance of the hearing to permit discovery on the assertions in the testimony. (*Id.* at 22-23.) After asking the parties for their views, the ALJ also stated that this appeared to be a case in which rebuttal testimony would be helpful, and that even with an April hearing date, time should probably be built into the schedule to allow for written rebuttal testimony. (*Id.* at 51-53.) For their part, the complainant and SAWCO indicated their willingness to hold a meeting in the near future to discuss discovery issues, as well as explore the question of whether mediation might make sense in this case. (*Id.* at 32-35, 49-51.)

Since the PHC, complainant has served SAWCO with an extensive request for documents.

³ Later, one of the members of the SAWCO board who was attending the PHC explained that water rights in the San Antonio Heights area are so valuable that if a shareholder list were made public, residents of the Heights might well be besieged by developers seeking to purchase their water rights. For this reason, the director stated that he and many other Heights residents have long opposed disclosure of the shareholder list. (*Id.* at 68-69.)

D. Scope of the Proceeding

Pursuant to the discussion at the PHC, the issues to be decided in this proceeding are as follows:

1. If complainant can prove that Yeager-Skanska was not a SAWCO shareholder and that the water allegedly used by Yeager-Skanska was water belonging to SAWCO (rather than to Upland or to all water rights holders in the Cucamonga Basin), would that fact – standing alone – be sufficient to establish that SAWCO has dedicated its water or facilities to public service?
2. May a mutual water company engage in a sale of “stored” water to one of its shareholders under the following circumstances without subjecting itself to Commission jurisdiction under Pub. Util. Code § 2702: (1) the sale occurs at a price above the mutual water company’s system average cost, (2) the stored water would otherwise be a wasting asset, (3) the shareholder to whom the sale is made is one of the water company’s only customers with the facilities necessary to take the stored water, and (4) the water that is sold can be replaced at a cost slightly above the sale price to the customer?
3. May a mutual water company sell water at a “supplemental” rate intended to induce customer conservation without subjecting itself to Commission jurisdiction under Pub. Util. Code § 2702, where the following circumstances apply: (1) the supplemental rate is above the water company’s system average cost, and (2) the supplemental rate is adopted without the benefit of a formal water rate study, or is inconsistent with the recommendations of such a study?
4. Should SAWCO be deemed to have made a sale of its water to non-shareholders that is not exempt from Commission jurisdiction under § 2705, where (1) the water in question is located in the San Antonio Canyon, (2) SAWCO’s rights in such water are the product of a judicial decree, and (3) such rights are subject to diversion rights and groundwater rights held by other landowners in the San Antonio Canyon? Even if SAWCO has permitted non-shareholders in the San Antonio Canyon to take some of its water that is not clearly subject to diversion or

groundwater rights, would such a fact be sufficient to establish that SAWCO has dedicated its water or facilities to public use?

5. Does the fact that more than 68% of SAWCO's shares are owned by Upland, a general law city, mean that although SAWCO operates as a stand-alone, independent company, its actions are exempt from Commission jurisdiction pursuant to *County of Inyo v. Public Utilities Commission*, 26 Cal.3d 154 (1980), and the progeny of that decision?

E. Schedule for the Proceeding

Pursuant to the discussion at the PHC, the schedule for this proceeding will be as follows:

Parties serve written direct testimony	March 24, 2006
Parties serve written rebuttal testimony	April 5, 2006
Hearings held in Upland at the Upland Carnegie Library, 123 D Street	April 17-21, 2006

At the conclusion of the hearing, the ALJ will set due dates for opening and reply briefs. At the present time, we do not foresee circumstances that would preclude the Commission from resolving this case within the 12-month period for adjudicatory proceedings set forth in Pub. Util. Code § 1701.2(d).

F. Categorization and Need for Hearing

This ruling confirms that this is an adjudication proceeding and that a hearing will be required unless the matter is otherwise disposed of, as set forth in the Instructions to Answer the complaint mailed on September 26, 2005.

G. Assignment of Presiding Officer

ALJ A. Kirk McKenzie is hereby designated as the presiding officer, pursuant to Rule 6.3.

H. Ex Parte Rules

Ex parte communications as to the issues within the scope of this proceeding are prohibited under Pub. Util. Code § 1701.2(b) and Rule 7(b).

In accordance with the foregoing discussion, **IT IS RULED** that:

1. The scope of this proceeding shall be as set forth in Section D above.
2. The schedule for this proceeding shall be as set forth in Section E above.
3. The presiding officer will be Administrative Law Judge McKenzie.
4. This proceeding is an adjudication scheduled for hearing.

5. *Ex parte* communications are prohibited under Pub. Util. Code § 1701.2(b) and Rule 7(b) of the Commission's Rules of Practice and Procedure.

Dated February 6, 2006, at San Francisco, California.

/s/ JOHN BOHN
John Bohn
Assigned Commissioner

/s/ A. KIRK MCKENZIE
A. Kirk McKenzie
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge on all parties of record in this proceeding or their attorneys of record.

Dated February 6, 2006, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.